No. 02-214

Supreme Court, U.S.
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In The

Supreme Court of the United States

GREENWAY ENTERPRISES, INC.,

Petitioner,

v.

TONY CASIANO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After the venire was dismissed and the selected jury was sworn, counsel for Greenway Enterprises, Inc. raised what he purported to be a *Batson* objection to one of Plaintiff's peremptory juror challenges on the basis of the potential juror's **social status** as a business owner. On the basis of reasoning presented in *State v. Ford*, 2001 MT 230, 306 Mont. 517, 39 P.3d 108, a case it had decided shortly after the initial denial of Greenway's *Batson* objection, the Montana Supreme Court determined that Greenway's objection was untimely. The issue here is whether this Court should grant a writ of certiorari where neither the Petitioner nor the juror involved were members of a class protected by *Batson* and where Petitioner's objection was made wholly on the basis of the Constitution of the State of Montana. Also at issue here is whether this Court should grant a writ of certiorari to determine whether requiring a substantive challenge to be brought while the district court still had the opportunity to cure the alleged defect was not procedurally novel, and therefore, did not preclude a *sua sponte* ruling on that issue by the Montana Court.

Although Petitioner asserts that the identical issue is presently pending before this Court in *Ford v. Montana*, Cause No. 01-10070, the Petitioner in that case based his initial objection on gender, a class recognized by decisions following *Batson*.

PARTIES

The Petitioner is Greenway Enterprises, Inc. (hereinafter "Greenway"), a Montana corporation located in Helena, Montana, and engaged in the business of general construction contracting.

The Respondent, Tony Casiano is Hispanic and was formerly employed as a laborer for Greenway. Mr. Casiano currently resides in Helena, Montana.

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RESPONSE TO MOTION FOR CERTIORARI JURISDICTION

This is a *Batson* case in name only. (*See Batson v. Kentucky*, 476 U.S. 79 (1986)). This Court does not have jurisdiction under 28 U.S.C. § 1257 (2001) because the Petitioner's claim arises solely under the Montana Constitution, Article II, Section 4[1] and not the United States Constitution. (*See* Pet. App. A page 8). Petitioner's supposed *Batson* objection was made with respect to the juror's ***social status*** as a business owner, a class not recognized by any federal law as being entitled to the protections afforded under this Court's ruling in *Batson v. Kentucky*, or the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

This case involved a wrongful discharge suit by laborer Tony Casiano against his employer Greenway Enterprises, Inc. After the venire was dismissed and the selected jury was sworn, counsel for Greenway moved the court to discharge the jury on the basis of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), a criminal case involving the challenge of a potential juror on account of

[1] Section 4 article II of the Montana Constitution provides that "[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."

his race. In explaining the motion, Greenway's Counsel stated "And it is our contention that the plaintiff exercised their peremptory challenges against Mr. Gregg because he's a business owner, *and that directly lies in contradiction with Section 4 Article II of the Montana Constitution based on his social status*." (Pet. App. 18 - C.) (Emphasis added.) At no point did counsel for Greenway make the prima facie showing that the basis for the peremptory challenge was race or gender as required by *Batson* and its progeny. The state District Court denied the motion.

After a three-day trial, the jury found that Tony Casiano had been discharged without good cause, and that Greenway had violated the express provisions of its own written personnel policy and awarded $40,908.00 in damages to Tony Casiano. Greenway filed a Motion for Judgment as a Matter of Law, or alternatively, for a new trial on the basis of the damages awarded. The District Court denied that motion, awarded costs and interest, and entered judgment for $43,777.33.

Greenway appealed to the Montana Supreme Court. The Montana Supreme Court affirmed the jury's verdict on counts one and three, and basing its reasoning on *State v. Ford*, 2001 MT 230, 306 Mont. 517, 39 P.3d 108, held that Greenway's *Batson* challenge was untimely.

The Montana Court's analysis of this case under a *Batson* objection was erroneous and somewhat ironic, because the only affected individual who is a member of a cognizable racial group, required by *Batson* to establish a prima facie case of purposeful discrimination in selection of the petit jury, is Respondent Tony Casiano. Tony Casiano is of Hispanic origin. (*See* Resp. App. A). People of

Hispanic origin were recognized as entitled to the specific protections of *Batson* in *Hernandez v. New York*, 500 U.S. 352 (1991).

Conversely, Petitioner Greenway Enterprises, Inc. is not and did not establish that it or the supposedly wrongfully excluded juror was a member of a cognizable racial group or suspect class, and because of that, did not establish a prima facie case of purposeful discrimination in selection of the petit jury via peremptory challenges as required by the *Batson* decision.

REASONS FOR DENYING THE WRIT

1. The "social status" objection raised by Greenway does not raise a cognizable claim under *Batson* or the Fourteenth Amendment of the Constitution of the United States.

Batson v. Kentucky held that to establish a prima facie case of purposeful discrimination in selection of the petit jury, defendant must first show that he is a member of a cognizable racial group, that the prosecutor had exercised peremptory challenges to remove from the venire members of the defendant's race and that the facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venireman from the petit jury on account of their race. *Batson v. Kentucky*, 476 U.S. 79 (1986).

In *Powers v. Ohio,* 499 U.S. 400 (1991), *Batson* was extended to allow a criminal defendant standing to object as a third-party to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors shared the same race. In so doing the

Powers Court discussed the importance of allowing all persons to be eligible to serve on a jury as codified at 18 U.S.C. § 243, which provides that no citizen otherwise qualified shall be disqualified for service as a juror on account of "race, color, or previous condition of servitude. . . ." *Powers v. Ohio,* 499 U.S. 400, 407-409.

The holding of *Batson* was further extended to civil cases in *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614 (1991), a case where a black construction worker who was injured in a job-site accident at a federal enclave sued the concrete company for negligence. During voir dire, the defendant company used two of its three peremptory challenges to remove black persons from the prospective jury. The Court there held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race, since race-based exclusion violates equal protection rights of the challenged jurors, and that the exercise of peremptory challenges by the defendant in the district court was pursuant to a course of state action based on defendant's extensive use of governmental procedures within the judicial setting. *Edmonson*, 500 U.S. at 628.

Finally, in 1994 the Court held that based on the *Batson* decision and the cases defining the scope of that case, the Equal Protection Clause also forbids intentional discrimination on the basis of gender, in the same manner as it prohibits discrimination on the basis of race. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994).

Batson has not been expanded beyond race and gender. The 8th Circuit declined to extend *Batson* to peremptory challenges based on age, reasoning that age, unlike race or gender, is not a suspect classification subject

to strict or even heightened scrutiny under the Equal Protection Clause. *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), *cert. denied*, 120 S.Ct. 794.

Similarly, where a defendant asserted that the government's use of its peremptory challenges to remove persons with Irish surnames violated his Sixth and Fourteenth Amendment rights to a jury drawn from a fair cross section of the community and his Fourteenth Amendment right to equal protection of the laws, the First Circuit Court of Appeals determined that in order to show membership in a "cognizable group" for *Batson* purposes, a defendant must show that (1) the group is definable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas or experiences runs through the group, and (3) a community of interests exists among the group's members, such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process. *Murchu v. U.S.*, 926 F.2d 50, 54 (1st Cir. 1991), *cert. denied*, 502 U.S. 828. *Murchu* stated that a further ingredient of cognizability was that the group be one the members of which are experiencing unequal, i.e. discriminatory treatment, and which needed protection from community prejudices. *Murchu* quoting *United States v. Bucci*, 839 F.2d 825, 833 & n. 11a (1988) ("The important consideration for equal protection purposes is not whether a number of people *see themselves* as forming a separate group, but whether others, by treating those people unequally, put them in a distinct group.")

In this case, the juror peremptorily challenged by the Respondent was a middle-aged white male business owner. Greenway did not show at the time, and does not now attempt to show, that the excluded juror is a member of any cognizable racial group or suspect class. Further,

the Petitioner Greenway Enterprises, Inc. is a business corporation existing under Montana law and not itself a member of any protected or suspect class. It is difficult to understand how counsel for the Petitioner can assert that either the excluded juror or Greenway Enterprises, Inc. is a member of a group which is experiencing unequal, i.e. discriminatory treatment, and is entitled to protection under the Equal Protection Clause. Ironically, the only member of a cognizable racial group or suspect class is the Respondent, Tony Casiano, a person of Hispanic descent. The so-called *Batson* objection was not plausible at the time it was made in state district court. For that reason this case fails to raise a cognizable federal law based claim, and otherwise is an inappropriate candidate for the Court to address the Montana Court's application of a procedural bar to purported *Batson* claims.

2. A timely objection requirement is not new or novel under Montana law, and would allow the Montana Supreme Court to rule *sua sponte* on that issue.

This Court has held that only a "firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent review by this Court of a federal constitutional claim. *James v. Kentucky*, 466 U.S. 341 (1984). That reasoning was followed in *Ford v. Georgia,* 498 U.S. 411 (1991) where the Court required that before the timing of a *Batson* objection could be used as a bar to the review of a federal constitutional claim based on *Batson*, the state court must have established and regularly followed a rule requiring that the objection must be made before the jury is sworn.

Irrespective of the correctness of characterizing Greenway's objection as one arising under *Batson*, it is clear that the Montana Supreme Court has long held that a defendant must raise an objection in a timely manner or the objection is waived. *Labbit v. Bunston* (1929), 84 Mont. 597, 277 P. 620.

Montana code requires that in order to preserve an objection to the admission of evidence for purposes of appeal, the objecting party must make a timely objection and state specific grounds for the objection. *See* Mont. R. Evid. 103(a)(1). To be timely, the objection must be made as soon as the grounds for the objection become apparent. *Hunt v. K-Mart Corp.* 1999 MT 125, 294 Mont. 444, 981 P.2d 275 citing *Kizer v. Semitool, Inc.* (1991), 251 Mont. 199, 207, 824 P.2d 229, 234 (citing McCormick on Evidence (3d ed.1984), § 52 at p. 126). *See also In re Marriage of Hayes* (1993), 259 Mont. 302, 856 P.2d 227.

In Montana criminal procedure, a specific statute requires that all challenges to the jury must be interposed before the jury is sworn except in certain circumstances. *See* Mont. Code Ann. § 46-16-117. The Montana Court has repeatedly stated that an important purpose of contemporaneous objections is to give the trial judge the first opportunity to correct any error. *See State v. Tucker*, 2000 MT 255, 301 Mont. 466, 10 P.3d 832; *State v. Clausell*, 2001 MT 62, 305 Mont. 1, 22 P.3d 1111; *State v. Finley* (1996), 276 Mont. 126, 915 P.2d 208 (overruled in part on other grounds by *State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817); *State v. Weinberger* (1983), 204 Mont. 278, 665 P.2d 202.

In Montana it is a "firmly established and regularly followed state practice" to require objections to be

interposed in a timely manner. The Montana Supreme Court has a long-standing practice of refusal to address the merits of the case where the objections were not timely made.

CONCLUSION

The Petition should be denied because this Court does not have the requisite jurisdiction under 28 U.S.C. § 1257 (2001). Additionally, the Petition should be denied because the Montana Courts have a firmly established and regularly followed state practice of refusing to address the merits of a case where an objection was not made in a timely manner.

Respectfully Submitted,

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

TONY CASIANO, Plaintiff, vs. GREENWAY ENTERPRISES, Inc., Defendant.	)	CAUSE NO. BDV-99-223

REPORTER'S TRANSCRIPT ON APPEAL

JURY TRIAL

Courtroom
Lewis and Clark County
Courthouse
Helena, MT
October 16, 17, 18, 19, 2000
Volume III (516-809)

HON. JEFFREY M. SHERLOCK,
DISTRICT JUDGE, PRESIDING

PREPARED BY: PENNY L. DOIG-MARTIN
OFFICIAL COURT REPORTER
HELENA, MONTANA

* * *

[558] than, say, Big John? Did anybody else have nicknames?

A. Well, Trent Wolstein gave me the nickname of Tex-Mex because I was from Texas and I'm Hispanic. There was other nicknames. Trent Wolstein was called

Buddha. Harry Vincent was called the Old Goat. And nicknames like that were around.

Q. In my notes I wrote this note because I wanted to be sure and ask you about it. And it doesn't fit in with what I've been asking you about right now. I want to ask you about the incident on June 10th where Mr. Ellermeyer showed your time sheet that you had moved a lead door on June 10th after you said you injured your back on June 5th.

Would you talk to the jury about moving a lead door on June 10th?

A. Lead door is really heavy. You know, one person couldn't be able to move it. This thing weighed a ton. I don't know exactly what it weighed. It weighed a lot. So we moved it with either the LOED. We got forklift, we moved it to the doorway. And from the doorway, we scooted it and got it on top of – I don't know what it's called. It's a little mechanical thing that

* * *